

The Globalization of Freedom

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I. THE RISE OF TRANSNATIONAL PUBLIC LAW

What kind of transnational law are we facing in the twenty-first century? Some commentators argue that even today, there is no real transnational legal field, only national legal fields and the activities of national actors in national settings, producing transnational legal activities.¹ But that reminds me of something a former law school dean told me sixteen years ago when I said I was coming to Yale to teach International Business Transactions: that there is no genuinely transnational body of international business law, because transnational business law is like that famous non-book, *The Law of the Horse*, which consists of Chapter I: "Contracting for a Horse," Chapter II: "Owning a Horse;" Chapter III, "Torts by a Horse," and Chapter IV: "Litigating over a Horse."

After teaching International Business Transactions many times, I must now respectfully disagree. For the most striking change in the law since I graduated from law school more than two decades ago is the rise of a body of law that is genuinely transnational—neither fish nor fowl, in the sense that it is neither traditionally domestic nor traditionally international. Just take the traditional subjects of the first-term American law school curriculum. Look at the law of transnational contract, particularly oil development agreements between multinational oil companies and developing nations. Are these more like treaties (traditional international law) or more like contracts (traditional domestic law)? The answer: it is not clear. Or the law of transnational tort—the Bhopal incident, for example—should that be governed primarily by Indian law, United States law, or by some emerging international standard of multinational corporate social responsibility? Again, not clear. Or the law of transnational crimes—terrorism, drug trafficking, trafficking in persons—is that fundamentally a domestic subject, a subject regulated by international

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1. See, e.g., Bryant G. Garth, "Research Themes in Respecting the Growth in Transnational Law," Paper delivered to a panel on "Beyond State and National Borders: The Growth of Transnational Law" at the Yale Law School Tercentennial Conference on "Dissolving Boundaries" at 1 (Apr. 28, 2001), at <http://www.law.yale.edu/yls/pdf/ter-garth.pdf> ("[T]here is no real 'transnational legal field.' There are only national legal fields, and the activities of national actors embedded in national settings produce transnational legal norms and activities.").

regimes, or does it lie somewhere in between? Or finally, the law of transnational civil procedure: the innovative American Law Institute/UNIDROIT project on the Transnational Rules of Civil Procedure has demonstrated that cutting across national borders are transnational procedural rules on, *inter alia*, jurisdiction, venue, service of process, and recognition of judgments; these are procedural rules that are neither local nor international, but fundamentally transnational in their character.² As time moves on, and commerce, telecommunications, culture and transport become increasingly globalized, a growing body of law and norms will emerge that is, on the one hand, universally recognized, but on the other, neither wholly domestic nor wholly international in its character or origin. Examples will include the emerging international *lex mercatoria* of the Uniform Customs and Practice for Documentary Credits (UCP), international finance terms used by the Clearing House Interbank Payments System (CHIPS), international regulatory rules created by such new global regulatory bodies as the Basle Committee of Central Bankers, and rules governing international domain names in cyberspace developed by entities such as the Internet Corporation for Assigned Network Names (ICANN).

My point is that as international legal academics, we must start treating transnational law as its own category. Domestic and international processes and events will soon become so integrated that we will no longer know whether to characterize certain concepts as local or global in nature. For example, is the metric system fundamentally national or international? Is Greenwich Mean Time fundamentally national or international? Is the term "dot.com" fundamentally national or international? None of these are any longer questions worth asking, because in each case, the answer is "both." All have become, over time, genuinely transnational concepts in which a global standard has become fully recognized, integrated, and internalized into the domestic system of nearly every nation of the world.

To carry my argument further, perhaps the most intriguing recent change in this body of transnational law has been the emergence and growth of a large body of transnational law that is fundamentally *public* in its character. Examples include the fields in which I recently worked as a public official—transnational human rights, democracy, and labor law—but also law and development, environmental law, the law of transnational crime, global cyberlaw, law and public health (e.g., the global AIDS crisis), and immigration and refugee law. Around the world, public law concepts are emerging, rooted in shared national norms and emerging international norms, that have similar or identical meaning in every national system: for example, the concept of "cruel, inhuman or degrading treatment" in human rights law, the concept of "civil society" in democracy law, the concept of "the internally displaced" in refugee and immigration law, or the concept of "transborder trafficking" of drugs and persons in criminal law. For transnational lawyers, incorporating these concepts into domestic legal practice has become our

2. See ALI/UNIDROIT Principles and Rules of Transnational Civil Procedure Discussion Draft No. 2 (Apr. 12, 2001), formerly Transnational Rules of Civil Procedure, available at <http://www.ali.org/ali/transrules.htm>.

equivalent of internalizing the global metric system into the American system of weights and measures. To what extent, for example, should we acknowledge that police brutality by local American police or prison conditions in state penitentiaries should meet not only the standards of the Constitution and 42 U.S.C. § 1983 jurisprudence, but also the international standards of torture or arbitrary detention acknowledged by international bodies? To what extent should our practice of executing juveniles or people with mental retardation under the Eighth Amendment meet evolving standards of international decency.³ To what extent should our understanding of the legality of same-sex marriage be informed by European or Australian standards construing treaties and protocols using phrases that are also in international instruments to which we are a party? And to what extent should our Supreme Court's recent decision in *Bush v. Gore*⁴ be subjected to the international standards of electoral fairness that we apply in Croatia or Peru or Ukraine, or the universality of the counting procedures applied in South Africa? (Indeed, it was precisely because of America's growing insistence upon a universally understood transnational public law standard for electoral fairness that the *Bush* decision has been treated abroad with such smug satisfaction.)

But if what we are facing in the twenty-first century is a growing body of transnational law that is inherently public in its character, how should this change the way American law schools teach their students? By analogy, we can think of the early part of the last century, when law students in the United States began thinking of themselves less as lawyers from Alabama or Connecticut or Oregon than as *American* lawyers, at which point the leading U.S. law schools turned away from a primary focus on state and local law and began teaching something called "national law." National law consisted of increased emphasis on uniform state rules and federal public law, and the teaching of professional responsibility by the pervasive method. In the same way, our current students are becoming increasingly comfortable with the idea of themselves as inherently multinational or transnational actors, who live in a world in which territorial borders have vanishing meaning.⁵ Given that this is the generation of law students that we will be training, how should this affect how we teach first-year students, how we teach advanced students, how we conduct research agendas, and how we teach professional responsibility?

First, it seems to me, we must address the puzzlingly exclusive focus on domestic law in the traditional first-year American law school curriculum. Rather than acting as if the world of torts, contracts, criminal law, and procedure are purely domestic, we should be teaching transnational law by the pervasive method. For example, in Contracts we should teach the United

3. See Brief of Amici Curiae Diplomats Morton Abramowitz et al., *McCarver v. North Carolina* (U.S. S.Ct. No. 00-8727, filed June 8, 2001) (making this argument with respect to people with mental retardation).

4. 531 U.S. 98 (2000).

5. This point was brought home to me recently when my preteen son, born of Korean and Irish-British ancestry, who has lived in England and traveled widely throughout Europe and North Asia, announced that he considers himself a native of the planet "Starcraft," who daily fights virtual alien beings on the "Battlenet," an indeterminate cyberjurisdiction, in which he is aided by cyber-colleagues who log in from Argentina, Sweden, North Africa, and South Korea!

Nations Convention on Contracts for the International Sale of Goods, the *Bhopal* case in Torts; World Trade Organization (WTO) rules on protection of intellectual property in Property law; the *Pinochet* case in Criminal Law,⁶ the rules of transnational civil procedure in Procedure, and the International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights in Constitutional Law.

Second, in our advanced courses, we need to prepare our students to deal adequately with the extraordinary growth of transnational public law. Just as the major shift in the focus of American law school curriculum and scholarship after the New Deal was away from the teaching of private law toward the teaching of public law, I would argue that the major shift of the twenty-first century law school curriculum will be away from domestic law, and even from the study of transnational private law subjects, toward the study of such emerging *transnational public law* subjects as the Law of Global Democracy, the Law of Global Governance and Regulation, the Law of Transnational Crime, The Law of Transnational Injury and Redress, the Law of Transnational Markets, the Law Of Transnational Dispute Resolution and the like. As we recognize the growth of transnational public law, increasingly we will have to focus on the best ways to integrate the teaching of international and domestic law; to study the ways in which public authorities do not or do not effectively regulate transnational actors—be they refugees, businesspeople, human rights activists, or terrorists—and to examine the issue of democratic deficits in these forms of transnational public regulation.

This may seem like a daunting task, but we have been here before, not once, but twice. Over the last generation, law faculties across Europe have struggled with this very issue, as they have considered how to teach their students not just about national and international law, but how to teach the future lawyers of Europe about the intricacies of European law. Nor is this simply a Western European phenomenon. Lawyers today in East Timor, Kosovo, Bosnia, and China (particularly those Chinese lawyers attempting to revamp Chinese law to bring it into compliance with WTO rules) all see their tasks in precisely the same light: how best to integrate and domesticate emerging international standards into their rapidly reforming domestic law?

Moreover, we can find a precedent in our own past, by examining similar episodes in our own legal history. In the early years of the American republic, when the United States was a small nation with almost no indigenous law, America was fundamentally a law-taker and a law-borrower. Early American lawyers, like the Timorese and Kosovar lawyers of today, were intimately familiar with how international law rules intertwined with domestic legal rules.⁷ But as I have discussed elsewhere, with the twentieth

6. *Regina v. Bartle*, House of Lords, 24 March 1999, [1999] 2 All ER 97, [1999] 2 WLR 827.

7. As my colleague John Langbein has pointed out in his recent brilliant lectures on the colonial history of the Yale Law School, one of the most important basic courses offered at the Litchfield Law School (Yale Law School's progenitor) was on the teaching of the law of nations as presented in Blackstone's and Kent's Commentaries, a critical device for adapting, internalizing and integrating international law and British common law into the law of the new American state. See John H. Langbein, "Blackstone, Litchfield, and Yale: The Founding of the Yale Law School." (unpublished

century and the dawn of the era of American global hegemony, American law became obsessed with America and the domestic legal agenda largely drove out the international. As a consequence, many public policy makers—especially our current judges—learned about law without ever learning or realizing how much international law is part of our law.⁸ During the darkest days of the Cold War, American public international lawyers became largely paralyzed by their own perceived impotence and irrelevance.⁹ But what gave new energy to the revival of international law in the 1970s and 80s was the transnational private law boom in international business transactions and international trade, the rise of the large multinational law firm, and new mixing of public and private, law and politics in international transactions with regard to issues such as sovereign immunity, choice of dispute-resolution fora, and nonstate actors, particularly multinational corporations. These developments gave new impetus to those who wanted to write about the integration of international law and other disciplines, as well as the connection between global governance structures, transnational legal processes, and national and private agendas.¹⁰

Different American law schools have tried different models to educate their students about the growth of transnational public law. The Harvard Law School model has traditionally brought large number of foreign students to the United States to join in conversations with one another and with American law students.¹¹ The New York University Global Law School model has recently brought large numbers of foreign professors to the United States to teach American and foreign students. The Yale Global Constitutionalism model has recently brought large numbers of foreign judges to hold seminars

paper on file with the author); see also Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2609-10 (1997) (describing the internalization of the law of nations into British and American common law).

8. See Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2364 (1991) (arguing that since the Vietnam War, “a generation of lawyers and judges has reached maturity unaware of America’s rich judicial history of applying international law and inclined to accept the recent status quo . . . as normatively desirable”) Perhaps only thus could Justice Antonin Scalia argue in his opinion in *Stanford v. Kentucky*, 492 U.S. 361, 370, n.1 (1989) (emphasis in original), that the Eighth Amendment does not prohibit the execution of juveniles for crimes committed at age sixteen, in part because “it is American conceptions of decency that are dispositive,” and Chief Justice Warren Burger could write in *Bowers v. Hardwick*, 478 U.S. 186, 197 (1986) that “[T]o hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching,” without even examining the jurisprudence of the European Court of Human Rights on the inconsistency of consensual sodomy laws with the right to respect for private life. See, e.g., *Dudgeon Case*, Ser. A., No. 45, 4 EHRR 149 (1981); see also *Norris v. Ireland*, European Court of Human Rights, 1989, Ser. A., No. 142, 13 EHRR 186 (post-*Bowers* application of *Dudgeon*).

9. For a history of American international legal scholarship during this era, see Koh, *supra* note 7, at 2614-24.

10. See, e.g., Anne-Marie Slaughter & Steven R. Ratner, *The Method is the Message*, 93 AM. J. INT’L L. 410 (1999) (reviewing methodologies of current international legal scholarship). Ironically, domestic legal scholars have recently begun to write volumes on the critical importance of norms and regimes in creating and shaping law. See, e.g., ERIC A. POSNER, *LAW AND SOCIAL NORMS* (2001). Yet for years, norms and regimes have ranked among the biggest items in the international and transnational lawyers’ tool kit. See generally Koh, *supra* note 7, at 2624-34.

11. For a cogent description of the current Harvard Law School approach, see Anne-Marie Slaughter, “Global Legal Practice and Global Legal Education,” Paper delivered to a panel on “Beyond State and National Borders: The Growth of Transnational Law” at the Yale Law School Tercentennial Conference on “Dissolving Boundaries” at 1 (Apr. 28, 2001), at <http://www.law.yale.edu/yls/pdf/ter-slaughter.pdf>.

for one another and for students on our campus. But as I learned—at times painfully—during my recent public service, the best way for American law professors to learn about the astonishing global changes also happens to be the most inconvenient—namely, for us to leave the comfort of our offices and to visit and work in difficult foreign environments—not just to visit abroad on sabbatical in comfortable Northern Hemisphere universities in Florence, Berlin, Oxford or Tokyo, but actually to go and conduct research and public policy work in some of the world's most dynamic centers of legal change, for example, Indonesia; Nigeria; China; North, West, and South Africa; and the Balkans.

II. THE OVERLOOKED GLOBALIZATION

This brings me to my third question: in an age of growing transnational public law, what should our research agenda become? In the academy these days, all the talk is of globalization. But although most of the focus of law schools has been on the obvious globalization of ideas, finance, commerce, and technology, scholars have largely overlooked the remarkable *globalization of human freedom* that to my mind marks the most profound social revolution of our time. Only three decades ago, there were fewer than twenty-five democracies in the world. Today, by some measures, 120 of the more than 190 countries in the world qualify, in form if not in substance, as governments with stated commitments to the preservation of freedom and democratic self-governance. This means that some 64% of the population on the planet now lives under some form of democratic rule.¹²

Yet in fact, as I found as I dealt daily with governments that nominally embrace the democratic path, for most of the world's peoples, freedom has proven to be a distinctly double-edged sword. On the one hand, the collapse of the Iron Curtain, the decline of dictatorship across Latin America, the rise of a new continental awareness in Africa, and the retreat by several Asian autocrats on insistence upon cultural relativism and Asian values, have left millions newly free to vote, to form political parties, to march in the streets, and to express their most democratic and heartfelt desires. On the other hand, the lifting of governmental controls has unleashed for millions as well the "freedom" to be victims of corruption, trafficking in drugs and human beings, the spread of disease and environmental damage, and the most terrifying forms of terrorism, as well as ethnic and communal violence.

To guide this headlong rush to global freedom, what role do we in the legal academy have to play? My time in the government has confirmed my worst fears: that in the world of foreign policy, those with ideas have too little influence; while those with influence have too few ideas. In the policy world, what academics write about is usually scorned, and more often, utterly ignored.¹³ To be sure, some of the blame properly falls on the bureaucrats and

12. These statistics are drawn from FREEDOM HOUSE, *DEMOCRACY'S CENTURY: A SURVEY OF GLOBAL POLITICAL CHANGE IN THE 20TH CENTURY* (1999), available at <http://www.freedomhouse.org/reports/century.html>.

13. The reaction is best captured by the response of one of my former State Department

the politicians, but much, I fear falls on us as well. Far too often we speak only to safe audiences, to one another or our students, in lecture halls far from the refugee camps, in books and journals whose readership we already know intimately, and at academic conferences in serene places far from the misery whose alleviation is ostensibly the object of our academic inquiry. Too rarely do we speak directly and bluntly to the policymakers who are actively seeking answers to the world's most vexing problems, but who lack the energy or time to find the best answers or to seek us out. The irony is that our commitment as academics to truth and our insulation from politics gives us unique freedom and independence to speak truth to power. But the question is whether the hard-won privilege of choosing our audiences will lead us unwittingly to squander that freedom, in the name of not getting our own hands dirty.

During the 1960s and 70s, American public law academics helped to shape the work of the American civil rights and antiwar movements.¹⁴ Similarly, when the Cold War ended, the academic community helped to build an impressive array of nongovernmental institutions to help educate newly free peoples on the responsibilities and opportunities posed by their newfound freedom.¹⁵ A major challenge currently facing global policymakers is deciding, as we marketize globally and democratize locally, how best to promote human rights without sacrificing cultural values.¹⁶ How can we use the globalization of human freedom to help solve emerging global problems (for example, global AIDS, global warming, transnational crime, refugee crises, and the like)? As uniquely privileged individuals, legal scholars have a special obligation to use their positions of academic privilege to leave the ivory tower to address these questions. We must teach others how to perpetuate their new and frightening freedom through the construction of wise restraints, the teaching of cultural understanding and tolerance, the development of self-sustaining social, political and economic institutions, and the acceptance of human dignity and human rights as genuinely universal values.

Fourth and finally, we must ask what as transnational law scholars we should teach in the way of professional responsibility to our global law

colleagues, Morton Halperin, to the academic work on global democracy that has focused on the so-called "democratic peace": the massively overstudied question of whether or not democracies fight with each other. *See, e.g.,* DEBATING THE DEMOCRATIC PEACE (Michael E. Brown et al. eds., 1996). Halperin posits that the only reason that no two democracies have been found to fight with one another is that, until now, there have been so few democracies, and that if and when two democracies do end up fighting, academics will turn their attention to proving that one or the other of the combatants, upon analysis, is not really a democracy after all!

14. An extraordinarily inspiring example was my late Yale colleague, Charles L. Black, Jr., who was not only an important player in drafting the brief in *Brown v. Board of Education*, but also wrote law review articles defending the lawfulness of the desegregation decisions. *See Charles L. Black, Jr.,* WASH. POST, May 13, 2001, at B6.

15. These have included the Open Society Institute, the Central European University, the National Endowment for Democracy, the National Democratic Institute and the International Republican Institute, as well as innumerable university centers and research institutes that were built to advance the study of post-Cold War democratic transition and development. These institutions have made outstanding contributions, and the need for individuals committed to their mission has only accelerated in the last few years,

16. For a particularly penetrating analysis of these questions, see Amy L. Chua, *The Paradox of Free Market Democracy, Rethinking Development Policy*, 41 HARV. INT'L L.J. 287 (2000).

students? If we want our students to be what Dean Kronman calls "lawyer-statesmen," not just scribes for the new global era, we should urge them—through clinical training, exhortation, and example—to be transnational lawyers who serve not just private interests, but public values. Our students should see themselves not just as passive facilitators of client desires, but as skeptical interlocutors with those who would make global decisions without reference to transnational public norms.¹⁷ Like the late Abe Chayes, we must teach our students to argue with their clients, to challenge them, to question what they are doing, and to urge them to direct their private activity into lawful channels.¹⁸ By identifying otherwise invisible legal constraints and finding available legal channels through which policy decisions can flow, transnational lawyers can help shape policy decisions, which in turn shape legal instruments, which in time become internalized into institutional decisionmaking processes, the key to promoting the growth and development of a vibrant system of transnational public law.¹⁹

All of this paints a fascinating picture of the explosive growth of transnational public law and its growing importance in the real world. A rational response by the American legal academy would be rapid changes in our first-term curriculum, our upper-level courses, our own scholarly and research agendas, and our approach to the subject of professional responsibility. Yet surprisingly, my sense is that things are not yet going this way. At a time when the American legal academy should be turning outward, we are instead turning inward. My main impression upon returning to academia from a rapidly globalizing world, in which transnational public law is of accelerating importance, is that many fellow legal academics not only are unaware of the growth of transnational public law, but are talking less and less about law altogether.

So let me end this essay not with an answer, but with a question: why is it that the American legal academy appears to be turning away from the study of law at precisely the moment that globalization has finally started to make the study of law really interesting?

17. No ethical law professor would seriously encourage a student to negotiate a deal for a corporate client with a state or local government in the United States that massively violated human rights, devastated the environment, or destroyed indigenous homelands. Yet few professors of international business transactions teach their students systematically about the public implications of transnational commercial arrangements their multinational corporate clients might enter into with foreign governments that might have the same result. For a significant exception, see DETLEV VAGTS, *TRANSNATIONAL BUSINESS PROBLEMS* 147-62 (2d ed. 1998). Significantly, nearly all the people identified by Dean Kronman as "lawyer-statesmen" were international lawyers. But over time, individuals such as Dean Acheson, Henry Stimson, John McCloy, and Robert Jackson evolved from the *public* international lawyer-architects of the post WWII World Order to the "in-and-outers." They became *transnational* lawyers, who have served not only as public servants, but also as partners of major multinational transactional firms. Lawyers such as Cyrus Vance, Carla Hills, Paul Warnke, Stuart Eizenstat, Charlene Barshefsky, and Robert Rubin have exemplified this trend. See ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 11-12 (1993).

18. For a description of how Abe Chayes did this, both as a public and a private lawyer, see Harold Hongju Koh, *An Uncommon Lawyer*, 42 HARV. INT'L L.J. 7, 8 (2001); see also David E. Rosenbaum, *Abram Chayes, John Kennedy Aide Dies at 77*, N.Y. TIMES, Apr. 18, 2000, at B8 (quoting Chayes) (There is "nothing wrong with holding the United States to its own best standards and best principles.").

19. See generally Koh, *supra* note 7; Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 206-08 (1996) (discussing the public role and obligations of transnational lawyers).